U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8887315

Date: MAR. 4, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a physician, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner previously married his second wife, T-M-, in an attempt to evade immigration laws, therefore barring the petition's approval under section 204(c) of the Act, 8 U.S.C. § 1154(c).[1] The Petitioner appealed the matter to us, and we dismissed the appeal.[2] We now reopen the appeal on service motion, withdraw our prior decision, and remand the matter to the Director for further action and consideration.

I. LAW

Section 204(c) of the Act, 8 U.S.C. § 1154(c), states:

> Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

U.S. Citizenship and Immigration Services (USCIS) cannot approve a petition if an individual previously married in an attempt to evade immigration laws. Section 204(c) of the Act, 8 U.S.C. § 1154(c). To invoke section 204(c) of the Act, the record must contain "substantial and probative"

[1] The Director did not make a finding regarding the Petitioner's claimed eligibility as a physician working in an area with a shortage of health care professionals.

[2] *See Matter of M-A-A-*, ID# 2032076 (AAO Feb. 19, 2019).

evidence of marriage fraud. 8 C.F.R. § 204.2(a)(1)(ii); *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990).

A petitioner has the initial burden to prove the bona fides of a marriage by a preponderance of the evidence. *Matter of P. Singh*, 27 I&N Dec. 598, 605 (BIA 2019). When the record contains evidence of fraud, USCIS must advise the petitioner, and the burden shifts to the petitioner to rebut the finding of fraud and establish that the prior marriage was not entered into for the purpose of evading the immigration laws. *Id.* at 605. The ultimate determination "is whether the parties 'intended to establish a life together at the time they were married.'" *See id.* at 601 (citing *Matter of Laureano*, 19 I&N Dec. 1, 2 (BIA 1983)).

For USCIS to deny a petition based on marriage fraud, the record must contain substantial and probative evidence of such fraud. *See id.* at 605-6 (citing *Saleh v. Holder*, 54 F. Supp. 3d 1163, 1169 (D. Nev. 2014)). The "substantive and probative evidence" standard of proof means that the evidence establishes "that it is more than probably true that the marriage is fraudulent." *See id.* at 607 (explaining that this standard is "higher than a preponderance of the evidence and closer to clear and convincing evidence").

II. ANALYSIS

In our prior decision, we agreed with the Director's determination that the Petitioner entered into his marriage with T-M- for the purpose of evading the immigration laws. On motion, the Petitioner maintains that the evidence is not sufficient to demonstrate that his marriage to T-M- was fraudulent and he requests that we apply the degree of proof set forth in *Matter of P. Singh*, which was issued by the Board of Immigration Appeals subsequent to our decision. Upon further review, we conclude that the derogatory evidence relating to the Petitioner's marriage to T-M-, when viewed in the context of the entire record, does not provide a degree a proof that is higher than a preponderance of evidence to constitute the "substantial and probative" evidence of marriage fraud required to deny a visa petition under *Matter of P. Singh*. *See id.* at 607. Accordingly, we withdraw our prior decision and the Director's determination that the Petitioner is barred under section 204(c) of the Act.

In the Director's decision denying the petition, she did not render findings as to whether the Petitioner is eligible for a physician national interest waiver. Section 203(b)(2)(B)(ii)(I) of the Act provides a national interest waiver for certain physicians who agree to work in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs. The implementing regulations at 8 C.F.R. § 204.12 indicate that a physician must agree to work full time for an aggregate of five years, and they set forth the evidentiary requirements to establish eligibility for the national interest waiver.

III. CONCLUSION

The determination that the Petitioner is barred under section 204(c) of the Act is withdrawn. We are therefore remanding the petition for the Director to consider whether the Petitioner meets the evidentiary requirements to establish eligibility for the physician national interest waiver.

ORDER: The motion is granted and our prior decision is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision which, if adverse, shall be certified to us for review.